103. If we were to establish a rebuttable presumption, i.e., a shift in the burden of proof to the BOC upon a particular showing by the complainant, we seek comment on the type of evidentiary showing the defendant BOC must make in order to rebut the presumption that it has ceased to meet the conditions for approval. For example, is it enough for the BOC to establish the propriety of its conduct? Further, we invite parties to comment on whether the burden should shift to the defendant for any and all alleged violations of sections 271 or 272. Or, should rebuttable presumptions exist only for some of the requirements of 271 and 272, such as the competitive checklist requirements of section 271 and the nondiscrimination provisions of section 272? If commenters believe that a rebuttable presumption should exist for certain requirements but not others, they should explain with specificity why violations of some requirements warrant a rebuttable presumption and violations of others do not. In addition, we ask parties to comment on whether there are other mechanisms, instead of burden-shifting, that will facilitate the ability of a complainant to obtain a full and fair resolution of its complaint within the 90-day statutory window.

104. The Commission has effectively established a rebuttable presumption under sections 201(b) and 202(a) whereby the rates and practices of non-dominant carriers are presumed to be lawful.[182] A complainant challenging a non-dominant carrier's rates or practices under these sections, therefore, must overcome this presumption of lawfulness in order to bring a successful action. A dominant carrier, on the other hand, is afforded no such presumption of lawfulness. We tentatively conclude that, in the context of complaints alleging that a BOC has ceased to meet the conditions required for the provision of in-region interLATA services, we will not employ a presumption of reasonableness in favor of the BOC or BOC affiliate, regardless of whether the BOC or BOC affiliate is regulated as a dominant or non-dominant carrier. We seek comment on this tentative conclusion.

105. Section 271(d)(6)(A) provides that if, at any time after approval of a BOC application, the Commission determines that the BOC has ceased to meet any of the conditions of its approval to provide interLATA services, the Commission may, after notice and opportunity for a hearing: (1) issue an order to the BOC to "correct the deficiency;"

---

[182] See, e.g., Competitive Carrier First Report and Order, 85 FCC 2d at 31-33, ¶¶ 88-96.

(2) impose a penalty pursuant to Title V;[183] or (3) suspend and revoke the BOC's approval to provide in-region interLATA services.[184]

106. We tentatively conclude that we will follow the procedures set forth in Title V to impose Title V penalties, including forfeitures, under this section. As to the non-forfeiture sanctions, we seek comment on whether the Commission should exercise its enforcement discretion and impose these sanctions on an individual case basis or whether we should establish specific legal and evidentiary standards for each type of sanction. Further, we seek comment on the appropriate "notice and opportunity for a hearing" for the imposition of these non-forfeiture sanctions both in the context of a complaint proceeding and on the Commission's own motion. We interpret "opportunity for hearing" not to require a trial-type hearing before an Administrative Law Judge (ALJ) (an APA hearing),[185] and invite comment on this interpretation. In coming to this view, we note that section 271(d)(6)(A) does not require a "hearing on the record," which would trigger these extensive procedural requirements under the APA.[186] Moreover, although proceedings under sections 204 and 205 of the Communications Act are generally conducted as rulemakings, these sections use similar language with respect to hearing requirements,[187] and proceedings pursuant to sections 204 and 205 generally occur through written responses. In addition, we note that, in allowing for forfeitures, section 271(d)(6)(A) specifically requires the Commission to impose forfeitures pursuant to Title V of the Communications Act. Section 503(b) of the Communications Act, the general forfeiture provision, although leaving the choice to Commission discretion, allows for either an adjudicatory proceeding before an ALJ (an APA hearing) or a paper hearing before the Commission pursuant to notice of apparent liability procedures. We also tentatively conclude that Congress, by imposing a 90-day deadline for complaints, did not intend to afford the BOCs trial-type hearings in enforcement proceedings pursuant to section 271(d). Finally, we also tentatively conclude that the filing of a complaint invoking the expedited procedures of section 271(d)(6)(B) may trigger a hearing

---

[183] Pursuant to section 503(b)(1)(B), a person who "willfully or repeatedly" fails to comply with any of the provisions of the Communications Act or any rule, regulation, or order issued by the Commission under the Communications Act, is liable to the United States for a forfeiture penalty. Section 503(b)(2)(B) authorizes the Commission to assess forfeitures against common carriers of up to one hundred thousand dollars for each violation, or each day of a continuing violation, up to a statutory maximum of one million dollars for a single act or failure to act. In exercising such authority, the Commission is required to take into account "the nature, circumstances, extent, and gravity of the violation and, with the respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require." 47 U.S.C. §§ 503(b)(1)(B), (b)(2)(B).

[184] 47 U.S.C. § 271(d)(6)(A).

[185] 5 U.S.C. §§ 554, 556, and 557.

[186] See U.S. v. Florida East Coast Railway Co., 410 U.S. 224 (1973).

[187] See 47 U.S.C. § 204(a) ("the Commission may . . . upon reasonable notice, enter upon a hearing"); and 47 U.S.C. § 205(a) ("[w]henever, after full opportunity for hearing").

under section 271(d)(6)(A) and that the written response by a BOC will generally afford the BOC sufficient hearing rights[188] to allow the Commission to impose non-forfeiture sanctions. We invite comment on these tentative conclusions.

107. We seek comment broadly on whether there are other ways, in addition to the sanctions listed in section 271(d)(6)(A), by which the Commission can create incentives for the BOCs to ensure that they continue to meet the conditions required for approval under section 271(d)(3). For example, would the adoption of alternative dispute resolution procedures, analogous to those mandated under section 273(d)(5) of the Communications Act, facilitate resolution of complaints alleging a violation of any of these conditions?[189] As we note above, section 271(d)(6)(B) of the Communications Act prescribes expedited procedures for the review of complaints alleging that a BOC has ceased to meet the conditions required for approval to provide in-region interLATA services. Are there other ways to expedite the resolution of such complaints? We seek comment on what else the Commission can do to facilitate the ability of a complainant to obtain a determination that a BOC has ceased to meet the conditions, which can then provide a basis for pursuing a private right of action for the recovery of damages in federal district court under section 207 of the Communications Act.

VIII. CLASSIFICATION OF LECS AND THEIR AFFILIATES AS DOMINANT OR NON-DOMINANT CARRIERS

108. In this section, we seek comment on whether we should regulate the BOC affiliates as non-dominant carriers in the provision of in-region, interstate, domestic, interLATA services. We also seek comment on whether we should continue to apply to independent LECs (i.e., LECs, other than the BOCs) the existing separation requirements established in the Competitive Carrier Fifth Report and Order,[190] which are a prerequisite for independent LECs to qualify as non-dominant carriers in the provision of interstate, domestic, interexchange services originating in their local exchange areas. Finally, we consider whether to apply the same regulatory classification to the BOC affiliates' and independent LECs' provision of in-region, international services as we adopt in this

---

[188] We retain discretion, of course, to require a trial-type hearing where warranted, e.g., disputed material factual issues. See Northwestern Indiana Telephone Company, Inc. v. FCC, 824 F.2d 1205, 1211 (D.C. Cir. 1987).

[189] See Implementation of Section 273(d)(5) of the Telecommunications Act of 1996, Dispute Resolution Regarding Equipment Standards, GC Docket No. 96-42, Report and Order, FCC No. 96-205 (rel. May 7, 1996).

[190] 98 FCC 2d at 1198-99, ¶ 9.

proceeding for their provision of in-region, interstate, domestic, interLATA services and in-region, interstate, domestic, interexchange services, respectively.[191]

A. Background

109. Under our rules, non-dominant carriers are not subject to rate regulation, and may file tariffs that are presumed lawful on one day's notice and without cost support.[192] Non-dominant carriers are also subject to streamlined section 214 requirements.[193] In contrast, dominant carriers are subject to price cap regulation, as specified by Commission order, and must file tariffs on 14, 45, or 120 days' notice, with cost support data for above-cap and out-of-band tariff filings, and with additional information for new service offerings.[194] Dominant domestic carriers must also obtain specific prior Commission approval to construct a new line, to extend a line or to acquire, lease or operate any line, as well as to discontinue, reduce, or impair service.[195]

110. In the Competitive Carrier First Report and Order, the Commission classified LECs and pre-divestiture AT&T as dominant, with respect to both local exchange and interstate long distance services, and therefore subject to the "full panoply" of then-existing

---

[191] As noted, this proceeding does not modify the Commission's separate framework, adopted in the International Services Order and Foreign Carrier Entry Order, for regulating U.S. international carriers (including BOC affiliates or independent LECs ultimately authorized to provide in-region international services) as dominant on routes where an affiliated foreign carrier has the ability to discriminate in favor of its U.S. affiliate through control of bottleneck services or facilities in the foreign destination market. See supra ¶ 18.

[192] Tariff Filing Requirements for Non-Dominant Carriers, CC Docket No. 93-36, Order on Remand, 10 FCC Rcd 13,653 (1995).

[193] See 47 C.F.R. §§ 63.71, 63 07(a).

[194] See id. §§ 61.41, 61.58(c).

[195] Id. §§ 63.01 et seq. We note that the Commission has simplified this process to permit a carrier to file an annual "blanket" Section 214 application for all construction planned for the year. See Id. § 63.06. We also note that, pursuant to section 402(b)(2)(A) of the 1996 Act, the Commission is required to "permit any common carrier . . . to be exempt from the requirements of Section 214 of the 1934 Act for the extension of any line." 47 U.S.C. § 402(b)(2)(A). We will address the implementation of section 402(b)(2)(A), including the issue of what constitutes an "extension of any line," in an upcoming proceeding. Finally, we note that the Commission has eliminated prior approval requirements to add, modify, or delete circuits on authorized international routes as they apply to U.S. international carriers that are regulated as dominant for reasons other than having foreign carrier affiliations. In addition, such dominant carriers are required to notify the Commission of the conveyance of international cable capacity. See Streamlining the International Section 214 Authorization Process and Tariff Requirements, IB Docket No. 95-118, FCC 96-79, ¶¶ 77, 80-81 (rel. Mar. 13, 1996) (Streamlining Order).

Title II regulation.[196] In contrast, the Commission classified MCI, Sprint, and other "miscellaneous common carriers" as non-dominant carriers.[197]

111. Later in the Competitive Carrier proceeding, the Commission reconsidered how it should regulate the provision of interstate, interexchange services by independent LECs. In the Competitive Carrier Fourth Report and Order, the Commission determined that interexchange carriers affiliated with independent LECs would be regulated as non-dominant interexchange carriers.[198] In the Competitive Carrier Fifth Report and Order, the Commission clarified that an "affiliate" of an independent LEC was "a carrier that is owned (in whole or in part) or controlled by, or under common ownership (in whole or in part) or control with, an exchange telephone company."[199] The Commission further clarified that, in order to qualify for non-dominant treatment, the affiliate providing interstate, interexchange services must: (1) maintain separate books of account; (2) not jointly own transmission or switching facilities with its affiliated exchange telephone company; and (3) acquire any services from its affiliated exchange telephone company at tariffed rates, terms and conditions.[200] The Commission added that any interstate, interexchange services offered directly by an independent LEC (rather than through a separate affiliate) or through an affiliate that did not satisfy the specified conditions would be subject to dominant carrier regulation.[201] The Commission observed that these separation requirements would provide some "protection against cost-shifting and anticompetitive conduct" by an independent LEC that could result from its control of local bottleneck facilities.[202]

112. In the Competitive Carrier Fifth Report and Order, the Commission also addressed the possible entry of the BOCs into interstate, interLATA services in the future:

---

[196] Competitive Carrier First Report and Order, 85 FCC 2d at 23, ¶ 63. In light of increasing competition in the interstate, domestic, interexchange telecommunications market, and evidence that AT&T no longer possesses the ability to control price unilaterally, we reclassified AT&T as a non-dominant carrier in that market. Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier, Order, 11 FCC Rcd 3271 (1996) (AT&T Reclassification Order), recon. pending.

[197] Competitive Carrier First Report and Order at 28, ¶ 78.

[198] Competitive Carrier Fourth Report and Order, 95 FCC 2d at 575-79, ¶¶ 31-37.

[199] Competitive Carrier Fifth Report and Order, 98 FCC 2d at 1198, ¶ 9.

[200] Id. The Commission noted that "[a]n affiliate qualifying for nondominant treatment is not necessarily structurally separated from an exchange telephone company in the sense ordered in the Second Computer Inquiry . . . ." Id.

[201] Id. at 1198-99, ¶ 9.

[202] Id.

> The BOCs currently are barred by the [MFJ] from providing interLATA services . . . . If this bar is lifted in the future, we would regulate the BOCs' interstate, interLATA services as dominant until we determined what degree of separation, if any, would be necessary for the BOCs or their affiliates to qualify for nondominant regulation.[203]

113. Because the 1996 Act has superseded the MFJ's prohibition against the BOCs' provision of interLATA services, we determine in this proceeding whether we should regulate the BOCs or their affiliates as dominant in the provision of in-region, interstate, domestic, interLATA services.[204] We also consider in this section whether we should modify our existing rules that require independent LECs to comply with the separation requirements described above in order to qualify for non-dominant regulatory treatment in the provision of interstate, domestic interexchange services that originate in their local exchange areas.

114. Our rules define a dominant carrier as one that possesses market power, and a non-dominant carrier as a carrier not found to be dominant (i.e., one that does not possess market power).[205] As noted, in the Competitive Carrier Fourth Report and Order, the Commission defined market power alternatively as "the ability to raise prices by restricting output" and "the ability to raise and maintain price above the competitive level without driving away so many customers as to make the increase unprofitable."[206] In determining whether the BOC affiliates or independent LECs should be classified as dominant or non-dominant, it is first necessary to define the appropriate product and geographic markets for assessing the market power of BOC affiliates in the provision of in-region, interstate, domestic, interLATA services and the market power of independent LECs in the provision of interstate, domestic, interexchange services originating in areas where they control local exchange facilities.[207] We also address the relevant product and geographic market

---

[203] Id. at n.23 (citing United States v. Western Elec. Co., 552 F. Supp. 131 (D.D.C. 1982) (subsequent history omitted)).

[204] As noted, we recently adopted interim rules regarding the treatment of BOCs and their affiliates in the provision of out-of-region, interstate, domestic, interexchange services. See supra n.39.

[205] 47 C.F.R. §§ 61.3(o), 61.3(t).

[206] Competitive Carrier Fourth Report and Order, 95 FCC 2d at 558, ¶¶ 7, 8 (citing A. Areeda & D. Turner, Antitrust Law 322 (1978); Broadcast Music v. Columbia Broadcasting System, 441 U.S. 1, 20 (1979); W.M. Landes & R.A. Posner, Market Power in Antitrust Cases, 94 Harv. L. Rev. 937, 937 (1981)). The 1992 Department of Justice/Federal Trade Commission Merger Guidelines similarly define market power as "the ability profitably to maintain prices above competitive levels for a significant period of time." 1992 Department of Justice/Federal Trade Commission Merger Guidelines, 4 Trade Reg. Rep. (CCH) ¶ 13,104, at 20,569 (1992 Merger Guidelines).

[207] We use the term "interLATA services" to refer to the interexchange services provided by BOC interLATA affiliates, because that is the term used by the 1996 Act.

definitions for assessing the market power of BOC affiliates and independent LECs in their provision of in-region, international services.

B. Definition of the Relevant Product and Geographic Markets

115. In the Interexchange NPRM,[208] we sought comment on whether we should retain the relevant product and geographic market definitions adopted in the Competitive Carrier proceeding with respect to the provision of domestic interexchange services.[209] Based on the analysis set forth in the 1992 Merger Guidelines,[210] we tentatively concluded that, under certain circumstances, we should use narrower market definitions than those adopted in the Competitive Carrier proceeding.[211] In this Notice, we seek comment on how we should apply in this proceeding the market definition approaches that we proposed in the Interexchange NPRM, assuming they are adopted. We also seek comment on how, if we do not adopt the approach proposed in the Interexchange NPRM, we should define the relevant product and geographic markets for purposes of this proceeding.

1. Relevant Product Markets

116. In the Competitive Carrier proceeding, the Commission defined the relevant product market,[212] for purposes of assessing the market power of domestic interexchange carriers covered by that proceeding, as "all interstate, domestic, interexchange telecommunications services" and concluded that there were no relevant submarkets.[213] In the Interexchange NPRM, we questioned whether a narrower product market definition might provide a "more refined analytical tool" for evaluating whether a carrier or group of carriers together possess market power.[214]

---

[208] Interexchange NPRM at ¶ 46.

[209] Id. at ¶¶ 40-63.

[210] See 1992 Merger Guidelines at 20,569.

[211] Interexchange NPRM at ¶¶ 41-42.

[212] A relevant product market is typically defined to encompass products that are "sufficiently close substitutes such that if a firm . . tries to raise its price substantially on any product in that market, it would promptly lose substantial business to these substitutes." Robert Pitofsky, New Definitions of Relevant Market and the Assault on Antitrust, 90 Colum. L. Rev. 1805, 1810 (1990).

[213] Competitive Carrier Fourth Report and Order, 95 FCC 2d at 563, ¶ 13.

[214] Interexchange NPRM at ¶ 44.

117. Under the 1992 Merger Guidelines, "[m]arket definition focuses solely on demand substitution factors -- i.e., possible consumer responses."[215] In the Interexchange NPRM, we noted that consideration of substitutability of demand supports the use of a narrower relevant product market than that defined in the Competitive Carrier proceeding.[216] Based on this analysis, we stated that "we believe that we should define as a relevant product market an interstate, interexchange service for which there are no close substitutes or a group of services that are close substitutes for each other, but for which there are no other close substitutes."[217]

118. We acknowledged, however, that it might be impracticable to delineate all relevant product markets for interstate, domestic, interexchange services. We also stated our belief that we need not do so, in light of our previous finding that substantial competition exists with respect to most interstate, domestic, interexchange service offerings.[218] We tentatively concluded that we should address the question of whether a specific interstate, domestic, interexchange service (or group of services) constitutes a separate relevant product market "only if there is credible evidence suggesting that there is or could be a lack of competitive performance with respect to that service (or group of services)."[219] We sought comment on this tentative conclusion in the Interexchange NPRM.[220]

119. Applying the approach proposed in the Interexchange NPRM, we note that, at this time, we are not aware of any evidence suggesting that there is a particular interLATA service or group of services that is or will be provided by the BOC affiliates or the independent LECs with respect to which "there is or could be a lack of competitive performance." We therefore tentatively conclude that, if we adopt the approach to product market definition outlined above (and proposed in the Interexchange NPRM), we should treat all interstate, domestic, interLATA telecommunications services as the relevant product market for purposes of determining whether the BOC affiliates have market power in the provision of interstate, domestic, interLATA services; for independent LECs, we likewise tentatively conclude that we should treat all interstate, domestic, interexchange telecommunications services as the relevant product market. We seek comment on this

---

[215] 1992 Merger Guidelines at 20,571. However, "[s]upply substitution factors -- i.e., possible production responses -- are considered . . . n the identification of firms that participate in the relevant market and the analysis of entry." Id.

[216] Interexchange NPRM at ¶ 46.

[217] Id.

[218] See id. at ¶ 47 (citing AT&T Reclassification Order, 11 FCC Rcd at 3309-35, ¶¶ 74-116).

[219] Id.

[220] To the extent that parties in this proceeding did not address this issue in the Interexchange proceeding, we invite them to do so here.

tentative conclusion. We also seek comment on whether credible evidence exists that suggests that there is a particular interexchange service or group of services that is or will be provided by the BOC affiliates or the independent LECs with respect to which "there is or could be a lack of competitive performance." Parties recommending that particular services be grouped in narrower relevant product markets should substantiate this contention with relevant evidence. Specifically, in order to make such a showing, in this proceeding or in the future, a party must present pricing or performance data or an analysis of structural factors that, in either case, show that the service or group of services is not competitive.

120. We also seek comment on alternative approaches to product market definition (including the product market definition established in the Competitive Carrier proceeding) that we should adopt in this proceeding if we decide not to adopt the approach proposed in the Interexchange NPRM. Parties should also discuss how these alternative approaches to product market definition should be applied in this proceeding.

121. In the International Competitive Carrier Order, the Commission determined that, for international service, demand and supply elasticity revealed distinct product markets, international message telephone service (IMTS) and non-IMTS.[221] The Commission concluded that (a) AT&T was dominant in the provision of IMTS, and (b) all other IMTS providers (e.g., Sprint and MCI), except the non-contiguous domestic carriers, were not dominant.[222] No carrier, the Commission found, was dominant in the provision of non-IMTS service. The Commission subsequently found AT&T to be non-dominant in the provision of IMTS.[223] We tentatively conclude that we should retain the same product definition for the provision of international services by the BOCs' affiliates and the independent LECs. We seek comment on this tentative conclusion.

2. Relevant Geographic Markets

122. In the Competitive Carrier proceeding, the Commission concluded that there was "a single national relevant geographic market (including Alaska, Hawaii, Puerto Rico, U.S. Virgin Islands, and other U.S. offshore points) for interstate, domestic, interexchange telecommunications services, with no relevant submarkets."[224] In the Interexchange NPRM, we observed that "more sharply focused market definitions will aid us in evaluating whether

---

[221] International Competitive Carrier Policies, 102 FCC 2d 813, 821-22, ¶ 22 (1985) (International Competitive Carrier Order), recon. denied, 60 R.R.2d 1435 (1986); International Competitive Carrier Order, 102 FCC 2d at 822, ¶ 22, n.20 (also treating television, space segment and multi-purpose earth station services as separate products); see also id. at 816, ¶ 6, n.6 ("[e]xamples of non-IMTS services are telex, telegram . . . private line, high and low speed data, [and] videoconferencing").

[222] Id. at ¶ 47.

[223] See AT&T Reclassification Order, 11 FCC Rcd 3271.

[224] Competitive Carrier Fourth Report and Order, 95 FCC 2d at 574-75, ¶ 30.

the BOCs possess market power with respect to the provision of interLATA services in areas where they provide local access service."[225]

123. As previously noted, the 1992 Merger Guidelines focus on demand substitution factors for purposes of market definition. In considering these factors in the Interexchange NPRM, we noted that, at its most fundamental level, interexchange calling involves a customer making a connection from a specific location to another specific location.[226] We also expressed the view that most telephone customers do not view interexchange calls originating in different locations to be substitutes for each other.[227] Accordingly, we tentatively concluded that "the relevant geographic market for interstate, interexchange services should be defined as all calls from one particular location to another particular location."[228] We sought comment on this tentative conclusion in the Interexchange NPRM.[229]

124. We recognized, however, that it would be impracticable to conduct a market power analysis in each geographic market implied by this point-to-point market definition.[230] We also stated our belief that, in the majority of cases, economic factors and the realities of the marketplace should cause point-to-point markets to behave in a sufficiently similar manner to allow us to evaluate broader, more manageable groups of markets for purposes of market power analysis.[231] We tentatively concluded that we should generally continue to treat interstate, interexchange services as a single national market when examining whether a carrier or group of carriers acting together has market power.[232] We expressed the belief, however, that there may be special circumstances that require us to examine an area smaller than the entire nation, for purposes of market power analysis.[233] We therefore proposed "to

---

[225] Interexchange NPRM at ¶ 40.

[226] Id. at ¶ 49.

[227] Id.

[228] Id. Because this analysis is limited to interstate, domestic, interexchange telecommunications services, the originating and terminating locations will be located in different U.S. states. As noted in the Interexchange NPRM, at ¶ 49 n.116, defining a relevant geographic market as transport between two specific points is well established in other contexts. For example, the Department of Justice has used city pairs as the relevant geographic market for evaluating mergers in the airline industry. See, e.g., Robert D. Willig, Antitrust Lessons from the Airline Industry: The DOJ Experience, 60 Antitrust L.J. 695, 697-98 (1991).

[229] To the extent that parties in this proceeding did not address this issue in the Interexchange proceeding, we invite them to do so here.

[230] Interexchange NPRM at ¶ 50.

[231] Id.

[232] Id. at ¶¶ 51-52.

[233] Id. at ¶ 53.

examine a particular point-to-point market (or group of markets) for the presence of market power if there is credible evidence suggesting that there is or could be a lack of competition in that market (or group of markets) and there is a showing that geographic rate averaging will not sufficiently mitigate the exercise of market power (if it exists) in that market (or group of markets)."[234]

125. In applying that approach, we believe that there are special circumstances that make it appropriate for us to examine an area smaller than the entire nation for purposes of assessing the market power of a BOC affiliate or independent LEC. As discussed above,[235] it is possible that a BOC, through cost misallocation or discrimination, may be able to use its market power in local exchange and exchange access services to disadvantage the BOC affiliate's interexchange competitors. Such cost misallocation or discrimination conceivably could enable the BOC affiliate eventually to obtain the ability to raise unilaterally its price for in-region, interstate, domestic, interLATA services above competitive levels by restricting its output. With respect to each originating in-region location, the determination of whether a BOC affiliate or independent LEC possesses market power in that market will turn on the same issue -- whether the BOC or independent LEC can leverage the market power arising from its control of access facilities sufficiently to give the BOC affiliate or independent LEC affiliate, respectively, market power in that point-to-point market in the provision of interstate, domestic, interLATA services or interstate, domestic, interexchange services, respectively. We believe that, given the BOCs' and independent LECs' current retention of monopoly control over bottleneck facilities, a BOC or independent LEC can exercise market power in either all or none of these point-to-point markets originating in the areas where the BOC or independent LEC controls local exchange facilities. We also recognize that geographic rate averaging of interstate long distance services alone may not be sufficient to offset the anticompetitive effects of a BOC's or independent LEC's use of the market power resulting from its control over local access facilities.[236]

126. We tentatively conclude, therefore, that, at this stage, the BOCs' current monopoly control of bottleneck facilities constitutes "credible evidence suggesting that there is or could be a lack of competition" with respect to interstate, domestic, interLATA services originating in a BOC's in-region area. Consequently, we tentatively conclude that we should evaluate a BOC's point-to-point markets in which calls originate in-region separately from its point-to-point markets in which calls originate out-of-region, for the purpose of determining whether a BOC interLATA affiliate possesses market power in the provision of in-region, interstate, domestic, interLATA services. Similarly, we tentatively conclude that we should

---

[234] Id.

[235] See supra Section I.B.

[236] Interexchange NPRM at ¶ 53 (stating that "if a BOC's interexchange customers and traffic are concentrated in one region, the BOC might find it profitable to raise prices above competitive levels, even if geographic rate averaging might cause it to lose market share outside that region.")

evaluate an independent LEC's point-to-point markets in which calls originate in its local exchange areas separately from its markets in which calls originate outside those areas, for the purpose of determining whether an independent LEC possesses market power in the provision of in-region, interstate, domestic, interexchange services.

127. We seek comment on this proposed approach. We invite parties to discuss why they believe we should examine smaller or larger areas for purposes of determining whether a BOC affiliate or independent LEC possesses market power in the provision of interstate, domestic, interLATA services or interstate, domestic, interexchange services, respectively.

128. We seek comment on alternative approaches to geographic market definition that we should adopt in this proceeding (including the geographic market definition established in the Competitive Carrier proceeding) if we decide not to adopt the approach proposed in the Interexchange NPRM. Parties should also discuss how these alternative approaches to geographic market definition should be applied in this proceeding.

129. In the International Competitive Carrier Order, the Commission determined that, for international service, every destination country constituted a separate geographic market based "primarily on the need for a carrier to obtain an operating agreement prior to providing service to a given country."[237] With the possible exception of routes where a BOC affiliate or independent LEC is affiliated with one or more foreign carriers, we believe that there are no critical distinctions on the basis of a BOC affiliate's or independent LEC's market shares, their respective sizes and resources, demand and supply elasticities, or conditions of entry from one destination country to another which would require a route-by-route analysis of these carriers' market positions. Further, the Commission recently determined that there is no evidence to "suggest[] that entry barriers vary substantially among geographic markets."[238] Thus, we tentatively conclude that, for purposes of this proceeding, we can analyze the market power of the BOC affiliates and independent LECs on a worldwide basis, and need not generally make route-by-route findings, with the exception of routes in which the carriers are affiliated with foreign carriers in the destination market.[239] We seek comment on this tentative conclusion. We also invite parties to discuss why they believe we should examine smaller areas for purposes of determining whether a BOC affiliate or independent LEC possesses market power in the provision of in-region, international services.

---

[237] International Competitive Carrier Order, 102 FCC.2d at 828, ¶ 37.

[238] See AT&T Reclassification Order, 11 FCC Rcd at 3274.

[239] See supra ¶ 18; infra ¶ 151.

C. Classification of BOC Affiliates

130. In this section, we consider whether we should relax the dominant carrier regulation that under our current rules would apply to in-region, interstate, domestic, interLATA services provided by BOC affiliates. In order to do so, our rules require us to determine that the BOC affiliates will not possess market power in the provision of those services in the relevant product and geographic markets.[240] We also consider whether to apply the same regulatory classification to the BOC affiliates' provision of in-region, international services as we impose on their provision of in-region, interstate, domestic, interLATA services.

131. As a preliminary matter, we note that there are two ways in which a carrier can profitably raise and sustain prices above competitive levels and thereby exercise market power. For convenience, we refer in the following discussion to a carrier's ability to engage in such a strategy as the ability to "raise prices." First, a carrier may be able to raise prices by restricting its own output (which usually requires a large market share); second, a carrier may be able to raise prices by increasing its rivals' costs or by restricting its rivals' output through the carrier's control of an essential input, such as access to bottleneck facilities, that its rivals need to offer their services.[241]

---

[240] Our analysis of whether the BOC affiliates should be classified as dominant or non-dominant in the provision of in-region, interstate, domestic, interLATA services has no bearing on the determination of whether a BOC affiliate has satisfied the requirements of section 271(d)(3), and it is not to be taken as prejudging such determinations in any way.

[241] Courts applying the Sherman Act have long distinguished between the ability of a firm to restrict output and raise its price above the competitive level and the ability of a firm to leverage its market power in one market to gain a competitive advantage in a second market. See, e.g., United States v. Griffith, 334 U.S. 100, 107-08 (1948) (holding that monopoly power had been illegally used "to beget monopoly"); Berkey Photo, Inc.v. Eastman Kodak Co., 603 F.2d 263, 275-76 (2d Cir. 1979), cert. denied, 444 U.S. 1093 (1980); Viacom Intern'l Inc. v. Time Inc., 785 F. Supp. 371 (S.D.N.Y. 1992). Although a number of courts have disagreed with Berkey's conclusion that "the use of monopoly power attained in one market to gain a competitive advantage in another is a violation of section 2 [of the Sherman Act], even if there has not been an attempt to monopolize the second market," Berkey, 603 F.2d at 276 (emphasis added), these courts have not questioned the distinction described above. See, e.g., Alaska Airlines, Inc. v. United Airlines, Inc., 948 F.2d 536, 547 (9th Cir. 1991); Fineman v. Armstrong World Indus., Inc., 980 F.2d 171, 206 (3d Cir. 1992). Economists likewise have recognized such a distinction by distinguishing between "Stiglerian" market power, which is the ability of a firm profitably to raise and sustain its price significantly above the competitive level by restricting its output, and "Bainian" market power, which is the ability of a firm profitably to raise and sustain its price significantly above the competitive level by raising its rivals' costs and thereby causing the rivals to restrain their output. T.G. Krattenmaker, R.H. Lande, and S.C. Salop, Monopoly Power and Market Power in Antitrust Law, 76 Geo. L.J. 241, 249-253 (1987). We note that raising rivals' costs does not necessarily result in an increase in prices. If a BOC raises the costs of its affiliate's rivals so that the rivals raise their prices, the affiliate could choose not to raise its prices, in order to increase its market share. The exercise of this type of market power could also delay the introduction of new technologies or degrade the quality of service that a BOC affiliate's interLATA competitors would otherwise provide.

132. We seek comment on whether the BOC affiliates should be classified as dominant carriers in the provision of in-region, interstate, domestic, interLATA services under our rules only if we find that they have the ability to raise prices of those services by restricting their own output, or whether the affiliates should be classified as dominant if the BOCs have the ability to raise prices by raising the costs of their affiliates' interLATA rivals. We believe that our regulations associated with the classification of a carrier as dominant generally are designed to prevent a BOC affiliate from raising price by restricting its output rather than to prevent a BOC from raising price by raising its rivals' costs. For example, price cap regulation of a BOC affiliate's retail rates for in-region, interLATA services should prevent the affiliate from achieving higher retail interLATA prices, but generally would not prevent the BOC from raising its affiliate's rivals' costs through discrimination or other anticompetitive conduct. Although price cap regulation could limit a BOC affiliate's ability to raise its interLATA rates if the BOC caused the affiliate's rivals to raise their prices by increasing their costs, price regulation would not prevent the affiliate from profiting from the BOC's raising of rivals' costs through increased market share. Such behavior would be profitable if the BOC were thereby able to retard a rival's innovation or cause its affiliate's rivals to lose market share to the affiliate. We note that this form of anticompetitive conduct might well involve increasing the affiliate's own output. We also note that the definitions of market power cited by the Commission in the Competitive Carrier Fourth Report and Order referred to the concept of a carrier raising price by restricting its own output.[242]

133. In determining whether a firm possesses market power, the Commission previously has focused on certain well-established market features, including market share, supply and demand substitutability, the cost structure, size, or resources of the firm, and control of bottleneck facilities.[243] All but the last of these features, bottleneck control, appear to focus exclusively on whether the carrier has the ability to raise price by restricting its own output.[244] With respect to the first index, market share, we believe that the fact that each BOC affiliate initially will have zero market share in the provision of in-region, interstate, domestic, interLATA services suggests that the affiliate initially will not be able profitably to raise and sustain its price by restricting its output. Because, however, the affiliate's zero market share results from its exclusion from the market until now, it says little about whether the affiliate would quickly achieve the ability to raise price by restricting output. Although our analysis below focuses on the possibility that a BOC affiliate would gain such ability through anticompetitive activity by the BOC, we recognize and seek comment on the possibility that an affiliate could gain such ability through means other than anticompetitive

---

[242] See Competitive Carrier Fourth Report and Order, 95 FCC 2d at 558, ¶¶ 7, 8.

[243] AT&T Reclassification Order, 11 FCC Rcd at 3293-94, ¶ 38; Competitive Carrier First Report and Order, 85 FCC 2d at 21, ¶ 57.

[244] As discussed below, a BOC's control of local exchange and access facilities is a factor with respect to both of the types of market power identified above. See infra ¶ 134.

conduct.[245] As to supply substitutability, since all interLATA customers currently are served by the affiliates' competitors and could continue to be served by them after BOC affiliates enter the domestic interLATA market, we believe that the availability of this transmission capacity will constrain the BOC affiliates' ability to raise its domestic interLATA prices.[246] Moreover, we recently found that the purchasing decisions of most customers of domestic interexchange services are sensitive to changes in price and would be willing to shift their traffic to an interexchange carrier's rival if the carrier raises its prices.[247] We also believe that the cost structure, size, and resources of the BOC affiliates are not likely to enable them to raise prices for their domestic interLATA services.[248] We seek comment on this analysis.

134. As noted above, in assessing whether a BOC affiliate would quickly achieve market power in the provision of in-region, interstate, domestic, interLATA services, we must also consider the significance of the BOCs' current control of bottleneck access facilities.[249] We noted earlier that a BOC's control of access facilities poses two principal problems as the BOC enters markets from which it has previously been prohibited -- improper allocation of costs and unlawful discrimination.[250] The BOCs' control of access facilities is a factor in both types of market power discussed above. In analyzing whether a BOC affiliate could raise its prices by restricting its own output, the primary inquiry is whether the safeguards in the 1996 Act and any Commission rules implementing these safeguards, coupled with other provisions of the Communications Act and Commission regulations, will sufficiently constrain a BOC's ability to improperly allocate costs, discriminate unlawfully, or engage in other anticompetitive conduct such that its affiliate would not quickly gain the ability to raise price by restricting its output of in-region, interstate, domestic, interLATA services. In analyzing whether a BOC could cause increases in the prices for in-region, interstate, domestic, interLATA services by raising the costs of its

---

[245] For example, the strength of a BOC's brand identity in its region alone might enable its affiliate to gain substantial market share quickly, thereby giving it the ability to raise price by restricting its output.

[246] See AT&T Reclassification Order at 3303-05, ¶¶ 57-62 (finding that AT&T's competitors possess sufficient excess capacity to absorb significant portions of AT&T's interLATA traffic, thereby constraining AT&T's unilateral pricing decisions).

[247] See id. at 3305-07, ¶¶ 63-66.

[248] See id. at 3309, ¶ 73 (finding that AT&T's cost structure, size, and resources did not constitute "persuasive evidence" of market power). In the AT&T Reclassification Order, the Commission noted that the issue is whether a carrier's "lower costs, sheer size, superior resources, financial strength, and technical capabilities" "'are so great to preclude the effective functioning of a competitive market.'" Id. (quoting Competition in the Interstate Interexchange Marketplace, CC Docket No. 90-132, Report and Order, 6 FCC Rcd 5880, 5891-92 (1991)).

[249] See Competitive Carrier First Report and Order, 85 FCC 2d at 21, ¶ 58 (control of bottleneck facilities is "prima facie" evidence of market power).

[250] See supra ¶¶ 7-8.

affiliate's interLATA rivals, the inquiry focuses on whether the statutory and regulatory safeguards will prevent a BOC from engaging in unlawful discrimination or other anticompetitive conduct that would raise its affiliate's rivals' costs.

135. As noted above, improper allocation of costs by a BOC is of concern because such action may allow a BOC to recover costs incurred by its affiliate to provide interstate, domestic, interLATA services from subscribers to the BOC's local exchange and exchange access services, in order to give the affiliate an unfair advantage over its competitors. For purposes of market power analysis, however, we are concerned with improper allocation of costs only to the extent it enables a BOC affiliate to set retail interLATA prices at predatory levels (i.e., below the costs incurred to provide those services), drive out its interLATA competitors, and then raise and sustain retail interLATA prices significantly above competitive levels. A BOC may be more likely to attempt to improperly allocate costs to the extent the BOC and BOC affiliate share common facilities and personnel.[251] As discussed above,[252] section 272 imposes structural safeguards to prevent a BOC from improperly allocating costs among its affiliate's interLATA services and services provided by the BOC. Specifically, the statute requires a BOC affiliate to "operate independently" from the BOC,[253] maintain separate books, records, and accounts from the BOC,[254] and have separate officers, directors, and employees.[255] In addition, a BOC affiliate must conduct all transactions with the BOC on an arm's length basis, and all such transactions must be reduced to writing and made available for public inspection.[256] We believe that these safeguards will constrain a BOC's ability to improperly allocate costs and make it easier to detect any improper allocation of costs that may occur.

136. We believe that price cap regulation of the BOCs' access services also reduces the potential that the BOCs would improperly allocate the costs of their affiliates' interLATA services. As the Commission previously explained, "[b]ecause price cap regulation severs the direct link between regulated costs and prices, a carrier is not able to recoup misallocated nonregulated costs by raising basic service rates, thus reducing the incentive for the BOCs to

---

[251] See United States v. Western Elec. Co., 552 F. Supp. 131, 192 (D.D.C. 1982) (subsequent history omitted).

[252] See supra Section IV.

[253] 47 U.S.C. § 272(b)(1). In Section IV.A, supra, we seek comment on the meaning of the phrase "operate independently."

[254] 47 U.S.C. § 272(b)(2). As noted above, we are addressing the implementation issues associated with this section in the Accounting Safeguards NPRM. See supra Section IV.B.

[255] Id. § 272(b)(3). In Sections IV.C and VI, supra, we seek comment on whether the sharing of administrative functions and marketing personnel would be permissible under section 272(b)(3).

[256] Id. § 272(b)(5). As previously noted, we are addressing the accounting issues associated with this provision in the Accounting Safeguards NPRM. See supra Section IV.E.

allocate nonregulated costs to regulated services."[257] We recognize that under our current interim LEC price cap rules, a BOC could select an X-factor option that requires it to share interstate earnings with its customers that exceed specified benchmarks and permit the BOC to make a low-end adjustment if interstate earnings fall below a specified threshold. Consequently, this regime may create some incentive for a BOC to allocate costs from interLATA services to access services in order to reduce the amount of profits the BOC is required to share with its interstate access service customers.[258] We note, however, that we have tentatively concluded in the BOC Accounting Safeguards NPRM that we should apply our affiliate transaction rules to transactions between the BOCs and their interLATA affiliates, in order to make it more difficult for a BOC to allocate to its regulated local exchange and exchange access services costs that should be assigned to its affiliate's in-region, interLATA activities.[259]

137. In addition, we note that, even if a BOC is able to allocate improperly the costs of its affiliate's interLATA services, it is questionable whether a BOC affiliate could successfully engage in predation.[260] At least three interexchange carriers -- AT&T, MCI, and Sprint -- have nationwide or near-nationwide network facilities.[261] These are large well-established companies with customers throughout the nation. It may be unlikely, therefore, that a BOC affiliate, whose customers presumably would be concentrated in one geographic region,[262] could drive one or more of these companies from the market. Even if it could do so, there is a question whether the BOC affiliate would later be able to raise prices in order to recoup lost revenues.[263] As Professor Spulber has observed, "[e]ven in the unlikely event that [a BOC affiliate] could drive one of the three large interexchange carriers into bankruptcy, the fiber-optic transmission capacity of that carrier would remain intact, ready

---

[257] BOC Safeguards Order, 6 FCC Rcd at 7596.

[258] Similarly, the possibility of future re-calibration of price cap levels also implies that price cap regulation does not fully sever the link between regulated costs and prices.

[259] Accounting Safeguards NPRM, Section III.B.1.d.

[260] See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 589 (1986) ("[P]redatory pricing schemes are rarely tried, and even more rarely successful.")

[261] AT&T Reclassification Order, 11 FCC Rcd at 3304, ¶¶ 60-61.

[262] We recognize that action taken in concert by two or more BOCs could have a more significant impact on interLATA competitors. We seek comment below on the effect, if any, that a merger of or joint venture between two or more BOCs should have on our determination of whether to classify one of the BOC's interLATA affiliate as dominant or non-dominant. See infra ¶ 148.

[263] See, e.g., Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 113 S. Ct. 2578, 2588 (1993) ("Recoupment is the ultimate object of an unlawful predatory pricing scheme; it is the means by which a predator profits from predation.")

for another firm to buy the capacity at a distress sale and immediately undercut the [affiliate's] noncompetitive prices."[264]

138. We seek comment on whether the structural safeguards in section 272, price cap regulation of the BOCs' access services, and the accounting safeguards proposed in the Accounting Safeguards NPRM are sufficient to prevent the BOCs from improperly allocating costs between monopoly local exchange and exchange access services and their affiliates' competitive interLATA services to such an extent that their interLATA affiliates would quickly gain the ability profitably to raise and sustain prices of in-region, interstate, domestic, interLATA services significantly above competitive levels by restricting its output of these services. If so, we seek comment on whether regulation of a BOC's interLATA affiliate as a dominant carrier would prevent the BOC affiliate from engaging in such pricing practices. We seek comment on whether a BOC's ability improperly to allocate the costs between interLATA and exchange access services would enable the BOC to raise the costs of its affiliate's interLATA competitors.

139. In addition to improper allocation of costs, a BOC potentially could use its market power in the provision of local exchange and exchange access services to the advantage of its interLATA affiliate by discriminating against the affiliate's interLATA competitors with respect to the provision of exchange and exchange access services. As previously discussed,[265] there are various ways in which a BOC could attempt to discriminate against unaffiliated interLATA carriers. For example, a BOC could provide its affiliate's interLATA competitors with poorer quality interconnection to the BOC's local network than it provides to its affiliate, or it could unnecessarily delay satisfying its competitors' requests to connect to the BOC's network.[266] To the extent that interexchange customers believe that the BOC affiliate offers a higher quality of service, the BOC affiliate may be able to raise its interLATA rates. Moreover, even occasional disruptions of a competing carrier's services may cause customers to choose another carrier. We believe that these and other forms of discrimination may be difficult to police, particularly in situations where the level of the BOC's "cooperation" with unaffiliated interLATA carriers is difficult to quantify. To the extent customers value "one-stop shopping," degrading a carrier's interexchange service may also undermine the attractiveness of the carrier's interexchange/local exchange package and thereby strengthen the BOC's dominant position in the provision of local exchange services.

140. As previously noted, sections 272(c) and (e) set forth both general and specific nondiscrimination safeguards that apply to BOC provision of in-region interLATA

---

[264] Daniel F. Spulber, Deregulating Telecommunications, 12 Yale J. on Reg. 25, 60 (1995).

[265] See supra Section V.A.

[266] As a more specific example, the BOC may fail to cooperate with an interLATA carrier that is introducing an innovative new service until the BOC's interLATA affiliate is ready to initiate the same service.

telecommunications service and other services.[267] For example, section 272(e)(3) requires that a BOC charge its affiliate "an amount for access to its telephone exchange service and exchange access that is no less than the amount [that the BOC charges] any unaffiliated interexchange carriers for such services."[268] Section 272 also restricts the ability of a BOC to provide "facilities, services, or information concerning its provision of exchange access to [its affiliate,] unless [it makes] such facilities, services, or information . . . available to other providers of interLATA services in that market on the same terms and conditions."[269] Section 272(e)(1) explicitly prohibits a BOC from discriminating against unaffiliated carriers by delaying their requests for exchange service and exchange access.[270] The statute also includes joint marketing restrictions to preclude, for example, a BOC affiliate from bundling long distance service with its affiliated BOC's local service, unless competing interexchange carriers have the same ability to bundle their long distance service with the BOC's local services.[271] As noted, we recognize that the nondiscrimination requirements in section 272 will not eliminate the BOCs' incentive to discriminate against competing interexchange carriers. We seek comment, however, on whether and the extent to which these safeguards would prevent the BOCs from gaining the two types of market power discussed above. Specifically, we seek comment on whether these safeguards would prevent a BOC from raising the costs of its affiliate's interLATA rivals by discriminating against those competitors, and on whether these safeguards would prevent a BOC from discriminating to such an extent that its interLATA affiliate would quickly acquire the ability profitably to raise and sustain the price of in-region, interstate, domestic, interLATA services significantly above competitive levels by restricting their output.

141. There is at least one other way, in addition to the improper allocation of costs and discrimination, in which a BOC could use the market power that arises from its control of local bottleneck facilities to give its affiliate a competitive advantage in the provision of in-region, interstate, domestic, interLATA services. Absent appropriate regulation, a BOC could potentially raise the price of access to all interexchange carriers, including its affiliate.[272] This would cause competing interLATA carriers to raise their retail interLATA

---

[267] In Section V, supra, we generally seek comment on what regulations, if any, are necessary to implement the statutory nondiscrimination requirements. We also seek comment in Section VII.B, supra, regarding what mechanisms are necessary to enforce these statutory requirements.

[268] 47 U.S.C. § 272(e)(3).

[269] Id. § 272(e)(2).

[270] Id. § 272(e)(1).

[271] See id. § 272(g). In Section VI, supra, we seek comment on what regulations, if any, are necessary to implement this provision.

[272] Equivalently, a BOC could fail to pass through to interexchange carriers a reduction in the cost of providing access services. Price cap regulation would not be effective in eliminating the effect of a price squeeze initiated under these circumstances.

rates in order to remain profitable. The BOC affiliate could then capture additional market share by not raising its prices to reflect the increase in access charges.[273] Although the BOC affiliate would report little or no profit, the BOC firm as a whole would receive higher access revenues from unaffiliated interexchange carriers and increased revenues from the affiliate's interLATA services causes by its increased share of interLATA traffic. If the BOC were to raise its access rates high enough, it would be impossible for the interexchange competitors to compete effectively. Thus, the entry of a BOC's affiliate into the provision of in-region, interstate, domestic, interLATA services gives the BOC an incentive to raise its price for access services in order to disadvantage its affiliate's rivals, increase its affiliate's market share, and increase the profits of the BOC overall. One constraint on the BOC's ability to engage in such conduct is the Commission's price cap regulation of the BOCs' access services. We seek comment on whether price cap regulation of the BOCs' access services prevents a BOC from raising its affiliate's rivals' costs by raising the price of access. We also seek comment on whether price cap regulation will sufficiently constrain a BOC from raising the price of access to such an extent that its interLATA affiliate would quickly gain the ability profitably to raise and sustain the price of in-region, interstate, domestic, interLATA services significantly above competitive levels by restricting its output. Parties arguing that price cap regulation is not a sufficient constraint on such anticompetitive behavior should also comment on what, if any, mechanisms could be implemented to address this issue.

142. Based on the preceding discussion of the ramifications of the BOCs' control of local facilities, we seek comment on whether the statutory and regulatory safeguards currently imposed on the BOCs and their affiliates are sufficient for us to relax the dominant carrier regulation that under our current rules would apply to in-region, interstate, domestic, interLATA services provided by the BOC affiliates. Parties should address this issue with respect to both types of market power discussed above -- raising price by restricting output and raising price by raising rivals' costs. Parties contending that the safeguards are not sufficient, and therefore that we should classify the BOC affiliates as dominant, should also comment with specificity on whether we should impose price cap regulation on those affiliates.[274]

143. Parties should also address whether regulating BOC affiliates as dominant carriers, including imposing price cap regulation on their in-region, interstate, domestic, interLATA services, would provide any additional protection against a BOC affiliate gaining market power in the provision of these services, beyond that provided by the safeguards established by the 1996 Act, our implementing rules, and our existing regulations. We thus seek comment on whether imposing dominant carrier regulation, including price cap

---

[273] This process is known as a price squeeze. See United States v. Aluminum Co. of America, 148 F.2d 416, 437-38 (2d Cir. 1945); Town of Concord v. Boston Edison Co., 915 F.2d 17, 18 (1st Cir. 1990).

[274] Pursuant to our rules, price cap regulation applies to dominant interexchange carriers as specified by Commission order. 47 C.F.R. § 61.41.

regulation, on a BOC affiliate would limit the incentive and ability of the BOC parent to engage in improper allocation of costs, discrimination, or other anticompetitive conduct. As previously discussed, dominant carrier regulation of the BOC interLATA affiliates may subject the affiliates' interLATA services to price cap regulation, as specified by Commission order, would require the affiliates to file interLATA tariffs with cost support data and on longer notice periods, and would impose more stringent section 214 requirements on the affiliates than those that apply to non-dominant carriers.[275] Although we currently review complaints against dominant carriers under a different standard than complaints against non-dominant carriers (non-dominant carriers rates and practices are presumed lawful, while non-dominant carriers receive no presumption of lawfulness), we have tentatively concluded in this NPRM that, in the context of complaints alleging that a BOC has ceased to meet the conditions required for the provision of in-region interLATA services, we will not employ a presumption of reasonableness in favor of the BOC or BOC affiliate, regardless of whether it is regulated as a dominant or non-dominant carrier.[276] Commenters should discuss which, if any, of the regulations that would be applicable to BOC affiliates as dominant carriers would constrain the ability of the BOCs to engage in improper allocation of costs, discrimination, or other anticompetitive conduct to the extent that the affiliate would gain market power. Commenters should also address any other costs or benefits of imposing dominant carrier regulation on BOC affiliates. Finally, parties that favor dominant carrier regulation of the BOCs' in-region interLATA affiliates should comment on whether there are additional, administratively workable and less burdensome safeguards that would permit us to regulate the affiliates as non-dominant carriers.

144. The entry of the BOCs into in-region interLATA services does not mark the first occasion when this Commission has considered the safeguards that are needed when a LEC provides a competitive service that uses the LEC's exchange access service. In the Competitive Carrier proceeding, the Commission examined the safeguards that would be required when an independent LEC provided interstate, domestic, interexchange services. The Commission initially concluded in the Competitive Carrier First Report and Order that it would regulate the independent LECs' interstate long distance services as dominant carrier offerings because of their control over bottleneck local exchange and exchange access facilities.[277] Subsequently, the Commission relaxed its regulation of interstate, domestic, interexchange services provided by an affiliate of an independent LEC, subject to the conditions discussed above,[278] but affirmed its regulation of such services under dominant carrier rules if the independent LEC offered the service directly.[279]

---

[275] See supra ¶ 109.

[276] See supra ¶ 104.

[277] Competitive Carrier First Report and Order, 85 FCC 2d at 24, ¶ 65.

[278] See supra ¶ 111.

[279] Competitive Carrier Fifth Report and Order, 98 FCC 2d at 1198-99, ¶ 9.

145. The Commission adopted a similar approach to BOC entry into the provision of enhanced services. As noted,[280] the Commission in the Computer II rulemaking initially imposed rigorous structural separation requirements on the BOC and its enhanced services affiliate.[281] The Commission later replaced these structural separation safeguards with the non-structural safeguards adopted in Computer III.[282] Based on its experience in administering the Computer II requirements, the Commission concluded that non-structural safeguards could furnish adequate protections against the risk of the BOCs engaging in anticompetitive improper allocation of costs and discriminatory practices in order to achieve an unfair advantage over competing enhanced services providers.[283]

146. Our experience with regulating the independent LECs' provision of interstate, domestic, interexchange services and the BOCs' provision of enhanced services suggests that our existing safeguards have worked reasonably well and generally have been effective, in conjunction with our regular audits of the BOCs, in deterring the improper allocation of costs and unlawful discrimination. To be sure, we have found instances where individual BOCs may not have complied with our non-structural safeguards in providing non-regulated services.[284] Our experience to date, however, has not disclosed a systematic pattern of anticompetitive abuses by independent LECs or the BOCs that would indicate that our safeguards are ineffective.

147. We recognize, however, that our experience in regulating the independent LECs' provision of interstate, domestic, interexchange services and the BOCs' provision of enhanced services may not be directly relevant to our analysis of the effectiveness of our existing and proposed safeguards that would apply to the BOCs' provision of in-region, interstate, domestic, interLATA service. The BOCs' local exchange and exchange access bottleneck facilities extend over much larger geographic areas than the independent LECs' facilities. Moreover, because the BOCs are likely to offer local exchange and interLATA services as integrated offerings to end users, they may have a greater incentive and ability to use their control over local bottlenecks to obtain anticompetitive advantages over their

---

[280] See supra n.88.

[281] BOC Separations Order, 95 FCC 2d 1117.

[282] See supra n.82.

[283] See BOC Safeguards Order, 6 FCC Rcd at 7576, ¶ 9. Although the U.S. Court of Appeals for the Ninth Circuit vacated portions of the Commission's Computer III decisions in three separate decisions, see supra n.88, the most recent decision found that the Commission had justified its elimination of structural separation. California v. FCC, 39 F.3d 919, 923 (9th Cir. 1994).

[284] See, e.g., Ameritech, Consent Decree Order, FCC 95-223 (rel. June 23, 1995); Southwestern Bell Telephone Company, Order to Show Cause, 10 FCC Rcd 4407 (1995); New York Telephone Co. and New England Tel. and Tel. Co.; Apparent Violations of the Commission's Rules and Policies Governing Transactions with Affiliates, Order to Show Cause and Notice of Apparent Liability for Forfeitures, 5 FCC Rcd 866 (1990).

interLATA rivals. Indeed, to the extent that both the BOCs and their competitors offer local and long distance services as a unified package, BOC practices that reduce the attractiveness of their competitors' long distance offerings would make the package of services as a whole less attractive. We invite parties to comment on this assessment.

148. As noted, two pairs of BOCs have proposed to merge their operations, which would result in merged BOCs of greater size and with larger in-region areas.[285] We seek comment on what effect, if any, a merger of or joint venture between two or more BOCs should have on our determination whether to classify the interLATA affiliate of one of those BOCs as dominant or non-dominant. Parties should also discuss what effect, if any, such a proposal to merge or to enter into a joint venture should have on this determination.

149. We also seek comment on whether, if we decide not to adopt the domestic market definition approaches discussed in the previous section of this NPRM, we should classify the BOC affiliates as dominant or non-dominant in the provision of in-region, interstate, domestic, interLATA services. Parties are invited to discuss how alternative approaches to market definition should affect how we classify the BOC affiliates in the provision of those services.

150. With respect to in-region, international services, we tentatively conclude that we should apply the same regulatory treatment for the BOC affiliates' provision of in-region, international services as we apply for their provision of in-region, interstate, domestic, interLATA services. The relevant issue in both contexts is whether the BOC affiliate can leverage its market power in local exchange and exchange access services to raise prices (by restricting its own output or by raising the costs of its rivals) in another market (the domestic interLATA or international market). We find no practical distinctions between a BOC's ability and incentive to use its market power in the provision of local exchange and access services to improperly allocate costs, discriminate against, or otherwise disadvantage unaffiliated domestic interexchange competitors as opposed to international service competitors. We thus tentatively conclude that we should apply the same regulatory treatment for BOC affiliates' provision of in-region, international services as we adopt for their provision of in-region, interstate, domestic, interLATA services. We seek comment on this tentative conclusion.

151. This tentative conclusion presumes that a BOC or BOC affiliate does not have an affiliation with a foreign carrier that has the ability to discriminate in favor of the BOC or an affiliate of the BOC through control of bottleneck services or facilities in a foreign destination market. Our proposal to adopt the same regulatory classification for a BOC affiliate's provision of in-region, international services as for its provision of in-region, interstate, domestic, interLATA services does not modify our decision to regulate a U.S. international carrier as dominant on those U.S. international routes where an affiliated

---

[285] See supra ¶ 40.

foreign carrier has the ability to discriminate against unaffiliated U.S. international carriers through control of bottleneck services or facilities in the foreign market. The safeguards that we apply to carriers that we classify as dominant based on a foreign carrier affiliation are contained in section 63.10(c) of the our rules and are designed to address the incentive and ability of the foreign carrier to discriminate in favor of its U.S. affiliate in the provision of services or facilities necessary to terminate U.S. international traffic. This framework for addressing issues raised by foreign carrier affiliations will apply to the BOCs' provision of U.S. international services as an additional component of our regulation of the U.S. international services market.

152. Finally, we observe that most of the section 272 safeguards will cease to apply to a BOC three years after the BOC or its affiliate is authorized to provide interLATA services under section 271(d), unless the Commission extends such period by rule or order.[286] To the extent effective local competition develops, the need for many of the section 272 safeguards will wane. We have no way of knowing at this time, however, the rate at which local competition will occur. We also intend to monitor the performance of the BOCs in the interexchange marketplace, including their affiliates' market share in the provision of in-region, interLATA services and in-region, international services. We may therefore consider in a later proceeding, if necessary, the impact that the removal of the section 272 safeguards pursuant to section 272(f)(1) would have on our regulation of BOC provision of in-region, interstate, domestic interLATA services and in-region, international services.

D. Classification of Independent LECs or Their Affiliates

153. In this section we consider whether we should modify our existing rules that require independent LECs (exchange telephone companies other than the BOCs) to comply with certain specified separation requirements in order to qualify for non-dominant regulatory treatment in the provision of in-region, interstate, domestic, interexchange services.[287] We also consider whether to apply the same regulatory classification to the independent LECs' provision of in-region, international services as we adopt in this proceeding for their provision of in-region, interstate, domestic, interexchange services. For purposes of this analysis, we tentatively conclude that, because control of local exchange and exchange access facilities is our primary rationale for imposing a separate affiliate requirement on independent LECs, we should limit application of these requirements to incumbent independent LECs that control local exchange and exchange access facilities. For purposes of determining which independent LECs are "incumbent," we propose to use the definition of "incumbent local

---

[286] 47 U.S.C. § 272(f)(1).

[287] As noted earlier, for purposes of this proceeding, we define an independent LEC's "in-region services" as telecommunications services originating in the independent LEC's local exchange areas or 800 service, private line service, or their equivalents that: (1) terminate in the independent LEC's local exchange areas, and (2) allow the called party to determine the interexchange carrier, even if the service originates outside the independent LEC's local exchange areas.

exchange carrier" as provided in section 251(h) of the Communications Act.[288] Section 251(h) provides that a LEC is an incumbent LEC, with respect to a particular area, if: (1) the LEC provided telephone exchange service in that area on the date of enactment of the 1996 Act (February 8, 1996), and (2) the LEC was deemed to be a member of NECA on the date of enactment or the LEC became a successor or assign of a NECA member after the date of enactment.[289] By limiting application of the separate affiliate requirements to incumbent independent LECs, we will avoid imposing unnecessary regulation on new entrants in the local exchange market, such as interexchange carriers, cable television companies, and CMRS providers, that will not have control of local exchange and exchange access facilities. We seek comment on this tentative conclusion.

154. Under the current rules as set forth in the Competitive Carrier Fifth Report and Order, independent LEC provision of interstate, domestic, interexchange services is subject to non-dominant treatment if such services are offered through an affiliate that meets certain requirements.[290] Specifically, in order to qualify for non-dominant treatment, the affiliate must: (1) maintain separate books of account; (2) not jointly own transmission or switching facilities with the exchange telephone company; and (3) obtain any exchange telephone company services at tariffed rates and conditions.[291] If an independent LEC provides interstate, domestic, interexchange services directly, those services are subject to dominant regulation.[292] The Fifth Report and Order separation requirements apply to all independent LECs, regardless of their size.[293] At this time, there are no independent LECs that are regulated as dominant in the provision of interstate, domestic, interexchange services. In other words, every LEC that provides such services has elected to do so through an affiliate satisfying the Competitive Carrier requirements, rather than providing those services directly subject to dominant regulation.

155. We believe that it is appropriate at this time to review the regulatory treatment of independent LEC provision of interstate, domestic, interexchange services. Although the 1996 Act does not alter the application of the Competitive Carrier separation requirements to

---

[288] 47 U.S.C. § 251(h).

[289] Id. Section 251(h)(2) also allows the Commission to provide, by rule, for the treatment of a LEC or category of LECs as incumbent in particular circumstances. 47 U.S.C. § 251(h)(2).

[290] Competitive Carrier Fifth Report and Order, 98 FCC 2d at 1198, ¶ 9. For purposes of qualifying for regulation as a non-dominant carrier, an "affiliate" of an independent LEC is "a carrier that is owned (in whole or in part) or controlled by, or under common control with, an exchange telephone company." Id.

[291] Id.

[292] Competitive Carrier Fourth Report and Order, 98 FCC 2d at 575-79, ¶¶ 31-36.

[293] Id. We note that some of our accounting rules relating to the Competitive Carrier Fifth Report and Order separation requirements do recognize a distinction between larger and smaller independent LECs. See discussion infra ¶ 159.